UNITED STATES BANKRUPTCY COURT

DISTRICT OF HAWAII

In re	)	Case No. 97-03746
	)	Chapter 11
UPLAND PARTNERS, a Hawaii Limited Partnership,	)	
	)	Re: Docket No. 3221
Debtor.	)	

MEMORANDUM DECISION DENYING MOTION TO VACATE JUDGMENT APPROVING SETTLEMENT

The court granted the trustee's motion to approve the compromise settlement of Richard Ferguson's claims against the debtor. William S. Ellis, Jr. filed a motion to vacate the judgment approving the settlement or, in the alternative, to make additional findings of fact and amend the judgment. Because the record is sufficient to support the settlement of Mr. Ferguson's claims and the settlement is reasonable, the motion to vacate will be denied.

I. Background

Like nearly all other aspects of this case, the procedural background of this matter is protracted and muddled.

Richard Ferguson filed claim no. 22 on June 12, 1998, in the amount of $986,886.41 for: (1) services Mr. Ferguson claimed he individually performed for

the debtor from March 30, 1990, to June 12, 1998, (2) interest, and (3) reimbursement of legal fees paid to Taylor Leong and Chee. Mr. Ferguson asserted that in partial compensation for the services he provided, Mr. Ellis assigned to him $100,000 of the accrued interest on promissory notes owed to Mr. Ellis by Upland Associates, a predecessor-in-interest to the debtor. Mr. Ferguson also asserted that Mr. Ellis assigned to Ferguson Partners, of whom Mr. Ferguson was the general partner, $250,000 of accrued interest in lieu of the balance of compensation for services rendered by Mr. Ferguson. The rest of the claim was for an alleged $5,000 per month salary for consultant fees.

William S. Ellis, Jr. filed an objection to claim no. 22 on the basis, among other things, that: (1) claims for services rendered prior to November 6, 1991, were barred by the six-year statute of limitations under Hawaii Revised Statutes section 657-1; and (2) the claimant did not submit documentary evidence describing the nature of the alleged services rendered, hours devoted, hourly rate, invoices or statements, or any other communication requesting or demanding payment (docket no. 386). The debtor in possession filed a joinder in Mr. Ellis' objection (docket

no. 416).[1] Kula-Olinda Associates [2] filed a response (docket no. 432) asserting that Mr. Ferguson's claim was frivolous and also filed a joinder in Mr. Ellis' objection (docket no. 453). A trial was scheduled for August 9, 1999. Thereafter, Kula-Olinda Associates filed a motion for summary judgment re: claim 22, objecting to Mr. Ferguson's claim (docket no. 467). At a hearing on June 30, 1999, Judge Lloyd King allowed Mr. Ferguson to pursue an unsecured claim in the amount of $100,000 based upon an undisputed assignment by Mr. Ellis to Mr. Ferguson of accrued simple interest on promissory notes. The court disallowed the rest of the claims objected to in proof of claim no. 22.[3]

On March 24, 2000, Mr. Ferguson filed claim no. 41 in the amount of $638,000 as an amendment to claim no. 22 for alleged services performed by Mr. Ferguson individually from March 30, 1990, to March 24, 2000. The claim alleged $100,000 and $250,000 of accrued interest owed on the notes assigned by Mr. Ellis, and $288,000 owed for services performed under a theory of quantum meruit. Mr. Ellis filed an objection to claim no. 41 on June 23, 2000 (docket no. 909), claiming that all but $100,000 of claim no. 41 was barred by the doctrines of

[1] Mr. Ellis served as the designated responsible individual for the debtor in possession under LBR 4002-1. Mr. Ellis effectively controlled the debtor in possession.

[2] Kula-Olinda Associates, allegedly a major secured creditor of the debtor, was also under Mr. Ellis' control.

[3] See order entered September 16, 1999 (docket no. 612).

res judicata, collateral estoppel, and estoppel by judgment.

On June 26, 2000, Mr. Ellis filed a motion for reconsideration of the partial allowance of claim no. 22 (docket no. 912). Mr. Ferguson then filed a motion to dismiss Mr. Ellis' reconsideration motion (docket no. 936). At a hearing on September 25, 2000, Judge King granted Mr. Ellis' reconsideration motion and sustained the objection to claim no. 22 in its entirety. Judge King found that Mr. Ellis had rescinded the notes before he purported to assign a portion of them to Mr. Ferguson, and that therefore Mr. Ferguson's claim for $100,000 based on the notes was invalid. Judge King also sustained the objection to claim no. 41 as to the $100,000 and $250,000 accrued interest [4] because of the court's earlier ruling disallowing these portions of claim no. 22. The $288,000 quantum meruit portion of claim no. 41 was set for an evidentiary hearing (docket no. 1084) on February 26, 2001. The evidentiary hearing was continued several times by stipulation.

On April 11, 2002, Mr. Ferguson filed a complaint to obtain a declaratory judgment against Mr. Ellis and others. Adversary Proceeding No. 02-00025. Mr. Ferguson alleged claims of (1) declaratory and injunctive relief; (2) breach of contract; (3) breach of duty of good faith and fair dealing; (4) tortious interference with prospective business advantage; and (5) punitive damages. There was no

[4] At the hearing on June 30, 1999, Judge King disallowed the claim for $250,000 in interest because the $250,000 was assigned to Ferguson Partners, not Mr. Ferguson individually.

actual litigation of the claims, however, because Mr. Ferguson voluntarily agreed to dismiss his complaint. The complaint was dismissed by order entered August 5, 2003.

On September 4, 2003, Trustee Richard Emery filed a motion for approval of a compromise settlement of Richard Ferguson's claims against the debtor (docket no. 2573). The settlement proposed to pay Mr. Ferguson $50,000 out of the debtor's estate in exchange for a release of all of Mr. Ferguson's claims against the debtor (docket no. 2577).[5] Mr. Ellis and P.F. Three Partners filed objections to the settlement agreement (docket nos. 2598, 2626). At hearing on October 14, 2003, the court approved the agreement. Mr. Ellis withdrew his objection to the compromise settlement and his objection to claim no. 41 on October 15, 2003 (docket nos. 2648, 2649).[6]

On December 15, 2003, P.F. Three Partners filed a motion to reconsider the order approving the settlement (docket no. 2693). Mr. Ferguson opposed the reconsideration motion (docket no. 2706) and the motion was denied by order

---

[5] The Trustee and Mr. Ferguson clarified at the hearing that Mr. Ferguson will receive a pro rata share (based on a $50,000 claim) of the funds available for general unsecured creditors. It is highly unlikely that Mr. Ferguson will actually receive $50,000 because the estate's funds are limited and Mr. Ellis' antics have unreasonably multiplied the estate's administrative expenses.

[6] Mr. Ellis does not state the reasons for his withdrawal of his objection to the compromise settlement and his withdrawal of his objection to claim no. 41. The withdrawal of both objections raises the question of whether Mr. Ellis has standing.

entered on January 8, 2004 (docket no. 2721).

P.F. Three Partners appealed the order approving the settlement to the district court. On June 18, 2004, the district court vacated the order approving the settlement (docket no. 2965). The district court held that "[b]ecause there is no evidence in the record on appeal that Upland owes Ferguson money for services he performed in his individual capacity for Upland, this court vacates the order approving the settlement and remands the matter to the Bankruptcy Court."[7]

On January 18, 2005, the trustee filed a second motion to approve the settlement of Richard Ferguson's claims (docket no. 3110). Also filed was Richard Ferguson's declaration detailing the services he performed individually for the debtor (docket no. 3113). Mr. Ellis and P.F. Three Partners filed oppositions (docket nos. 3193, 3195, 3197, 3199, 3201). On March 28, 2005, the motion came on for hearing and the court approved the settlement. The order was entered on April 20, 2005 (docket no. 3216).

Mr. Ellis filed the current motion on May 2, 2005, asking the court to vacate the order approving the settlement or to make additional findings of fact and amend the judgment.

II. Discussion

[7] See Order Vacating Order Approving Settlement And Remanding Matter at p.1.

A. Mr. Ellis Has Not Met The Standard For Granting A Motion to Alter Or Amend A Judgment

Mr. Ellis has already raised, or could already have raised, every argument made in his motion to vacate or amend the judgment. Federal Rule of Civil Procedure 59(e), made applicable to bankruptcy cases by Federal Rule of Bankruptcy Procedure 9023, provides that any motion to alter or amend a judgment should not be granted, absent highly unusual circumstances, unless the court is presented with newly discovered evidence, the court committed clear error, the alteration or amendment is necessary to prevent manifest injustice, or there is an intervening change in the controlling law. See McDowell v. Calderon, 197 F.3d 1253, 1255 (9th Cir. 1999). A rule 59(e) motion may not be used to relitigate old matters, or to raise arguments or present evidence that could have been raised prior to the entry of judgment. Zimmerman v. City of Oakland, 255 F.3d 734 (9th Cir. 2001); Kona Enterprises, Inc. v. Estate of Bishop, 229 F.3d 877 (9th Cir. 2000). This is an independently sufficient reason to deny the motion, but I will address Mr. Ellis' arguments nevertheless.

B. The Rules Of Preclusion Do Not Apply Because There Was A Direct, Not Collateral Attack On The Judgment Disallowing Mr. Ferguson's Claims

Mr. Ellis restates two arguments which he previously raised in his objection to claim no. 41, specifically issue preclusion (or collateral estoppel) and claim preclusion (or res judicata). Mr. Ellis argues that Mr. Ferguson may not relitigate claim no. 22 in the guise of claim no. 41 under the legal theory of quantum meruit not asserted in claim no. 22. He asserts that the controlling law in the Ninth Circuit is that once an issue is raised and determined, it is the entire issue that is precluded, not just the particular arguments raised in support of the first case.

Under 11 U.S.C. § 502(a), a claim or interest is deemed allowed unless a party in interest objects. A claim that has been allowed or disallowed may be reconsidered for cause. 11 U.S.C. § 502(j). A reconsidered claim may be allowed or disallowed according to the equities of the case. Id. Federal Rule of Bankruptcy Procedure 3008 provides that a party in interest may move for reconsideration of an order allowing or disallowing a claim against the estate. The Ninth Circuit has held that "the allowance or disallowance of 'a claim in bankruptcy is binding and conclusive on all parties or their privies, and being in the nature of a final judgment, furnishes a basis for a plea of res judicata.'" In re Bevan, 327 F.3d 994, 997 (9th Cir. 2003), citing Siegel v. Fed. Home Loan

Mortgage Corp., 143 F.3d 525, 529 (9th Cir. 1998). However, "concepts of claim preclusion do not apply directly to efforts to . . . secure direct relief from the judgment in the original action." Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction 2d § 4406 (2d ed. 2002).

Here, Mr. Ferguson amended claim no. 22 by filing claim no. 41. Although Mr. Ferguson did not move for reconsideration of the disallowance of claim no. 22, the filing of claim no. 41 as an amendment is, in effect, a request for reconsideration. As such, the request for reconsideration is a direct attack on the judgment disallowing claim no. 22. Thus, preclusion does not apply.

C. The Voluntary Dismissal Of Mr. Ferguson's Adversary Proceeding Has No Preclusive Effect

Mr. Ellis argues that Mr. Ferguson is precluded from litigating claim no. 41 because of the order dismissing the complaint in adversary proceeding no. 02-00025 entered August 5, 2003.

Mr. Ellis' assertion is incorrect. Mr. Ferguson voluntarily dismissed his complaint. There was no actual litigation of any issue related to any of the claims alleged by Mr. Ferguson. A stipulation of dismissal does not constitute a final judgment on the merits for the purpose of collateral estoppel. In re Herbert M. Dowsett Trust, 791 P.2d 398, 402 (Haw. Ct. App. 1990).

D. Approval Of The Settlement Is Supported By The Record

In his motion to vacate, Mr. Ellis states that the district court vacated the order approving the settlement agreement on the specific grounds that: (1) "[t]here is no evidence at all that Ferguson performed any services in his individual capacity that benefitted Upland"; (2) "[t]here is no evidence in the record to determine that Upland owes Ferguson money on a quantum meruit claim"[8]; and (3) "[t]here is no evidence to support the finding that the overall interest of the creditors was served by settling Ferguson's claim."[9]

At the hearing on March 28, 2005, the court granted the motion and approved the settlement agreement, stating that the record, through Mr. Ferguson's declaration, now contains evidence that Mr. Ferguson as opposed to his company provided the services to the debtor. Under the doctrine of law of the case, that was the only issue that was left open on remand. Ingle v. Circuit City, 408 F.3d 592, 594 (9th Cir. 2005).

In addition, the court reiterated its prior determination that the standard for

---

[8] The District Court stated: "[i]t may well be that the Bankruptcy Court was correct in determining that Upland owes Ferguson money on a quantum meruit basis, but the basis for what may be a correct determination simply does not appear in the record before this court." Order Vacating Order Approving Settlement And Remanding Matter at p. 2.

[9] The District Court stated: "[b]ecause there is no evidence in the record that supports a finding that Ferguson, rather than a corporation, did work that benefitted Upland, the court cannot tell whether the Bankruptcy Court was correct in determining that the creditors' interests were served by the settlement." Order Vacating Order Approving Settlement And Remanding Matter at p. 8-9.

approval of a settlement under the A & C Properties test was met and the settlement was reasonable. In determining the fairness, reasonableness and adequacy of the proposed settlement agreement, the court considered: (1) the probability of success in the litigation; (2) the difficulties, if any, to be encountered in the matter of collection; (3) the complexity of the litigation involved, and the expense, inconvenience and delay necessarily attending it; and (4) the paramount interest of the creditors and a proper deference to their reasonable views in the premises. In re A & C Properties, 784 F.2d 1377 (9th Cir. 1986). The trustee, as the party proposing the compromise, has the burden of persuading the bankruptcy court that the compromise is fair and equitable and should be approved. Id. at 1381. The trustee has met this burden. There is a realistic chance that Mr. Ferguson might prevail. The second prong, the difficulties in the matter of collection, was not relevant because the claim is against the estate and the neither the trustee nor the claimant will incur any collection expense or risk. The complexity of the litigation involved and the expense, inconvenience, and delay necessarily attending it was extremely high because of Mr. Ellis' invariable habit of delaying and complicating any litigation in which he is involved. The interest of the creditors was considered because all creditors received notice and only two closely allied parties in interest objected. Thus, the court concluded that the settlement was in the best interest of the estate and its creditors.

III. Conclusion

For the reasons stated above, the Motion to Vacate or Amend Judgment filed by Mr. Ellis will be denied.

DATED: Honolulu, Hawaii, June 28, 2005.

/s/ Robert J. Faris
United States Bankruptcy Judge